Supreme Court, U.S.
FILED

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOHN R. IVIMEY, SR.,

Petitioner,

v.

THE VARIABLE ANNUITY
LIFE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred, and deprived plaintiff of due process of law, by affirming a district court's dismissal of this case for want of jurisdictional amount, in view of its ruling that the parties' contract could be terminated, that it was terminated, or that plaintiff's Unfair Trade Practices claim was barred by the statute of limitations, where no such affirmative defenses were pled, nor ruling thereon complained of by any party on appeal or cross-appeal?

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STATEMENT OF JURISDICTION

The judgment in the Court of Appeals sought to be reviewed was entered on April 15, 1994.

The statutory provision conferring jurisdiction on this Court to review the judgment below by writ of certiorari is 28 U.S.C. 1254(1).

The statutory provision conferring jurisdiction on the district court is 28 U.S.C. 1332(a)(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. 1332(a)(1):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between --
> (1) Citizens of different States.

Connecticut General Statutes Sec. 52-595:

> Fraudulent Concealment of Cause of Action. If any person, liable to an action by another, fraudulently conceals from

> him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.

Applicable portion of the 5th Amendment to the Constitution of the United States:

> No person shall...be deprived of life, liberty, or property, without due process of law;...

Applicable portion of Fed. R. Civ. P. 8(c):

> Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively...statute of limitations...and any other matter constituting an avoidance or affirmative defense.

Applicable portion of Fed. R. Civ. P. 12(b):

> How Presented(Defenses). Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required.

Federal Rule of Evidence 901(1):

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

STATEMENT OF THE CASE

The pleadings in this case claim expectancy damages as a consequence of defendant's breach of an implied promise to make certain arrangements which would enable plaintiff to perform under the parties' contract. The result of said breach was that plaintiff was deprived of substantial income, earned each year, which was payable to him by defendant in small increments each year over many years. Evidence was introduced to the jury showing such increments would be payable for likely twenty years or more, on average, with the result that plaintiff, an individual contractor, would accrue annual earnings of between $50,000-$100,000 (Tr. June 9, 1993, pp. 32-102). However, the court dismissed the case for want of jurisdictional amount, implying that, since

the contract provided it could be termina-on thirty days notice, plaintiff's damages were limited to those incurred through the termination period. That ruling, at trial, contained no finding that a termination, in fact, occurred (Tr. June 10, 1993, pp. 48-49).

On a motion to reconsider, the court quoted a provision in the contract, ¶11(b), which states:

> "This contract may also be terminated by either party for any reason by giving the other party at least 30 days advance written or by mutual consent of both parties at any time. Upon any termination of this contract VALIC shall not be entitled to any further Compensation under this contract."

The court then again implies that the existence of such provision limits plaintiff's recovery to "expectation damages" for the period prior to receipt of termination notice, plus 30 days (D. 94, pp.4,5).

Said ruling also states (D. 94, p.6):

> The plaintiff, however, was not officially terminated until March of 1985.

No court below refers to any source for such assertion that any termination took place, that any "advance written notice" thereof was given by either party to the other, nor that there was any "mutual consent" of the parties thereto, as required by the aforesaid provision, ¶11(b). In fact, there is no record of any evidence to support any such assertion.

Nevertheless, the Court of Appeals affirmed all the foregoing rulings, citing a case and authority out of context, which pertain to action brought for unlawful terminations, not, as herein, for damages consequent to defendant's breaches, where no termination is alleged or shown. (see ruling, pp. 2-3, where the assertions of

the trial court are repeated without reference to the record expressly). Moreover, both courts below misstate the the testimony of plaintiff as to the amount of his earnings during the first few years of the contract by implying that he anticipated earnings of only $5,000 to $6,000 during those years. In fact, plaintiff expressly clarified in his testimony that such might be the portion of his earnings payable to him during those years, supra p. , (Tr. June 9, 1993, pp.101-102, Tr. June 10, 1993, p.29), but that the income actually earned during those years would not be all payable to him for many years. Also, defendant never pleaded any termination as an affirmative defense or otherwise.

It should also be noted that plaintiff also pleaded breach of covenants of good faith and fair dealing.

Also appealed was a ruling of the district court that plaintiff's separate claim, pursuant to the Connecticut Unfair Practices Act (CUTPA), is barred on the asserted ground that plaintiff is an "employee" of defendant. The Court of Appeals did not rule on that issue, but instead ruled that the CUTPA claim is barred by the statute of limitations.

In fact, no such statute of limitations issue was ruled on in the trial court, other than its ruling plaintiff's motion to amend the complaint to plead CUTPA was granted, notwithstanding defendant's objection thereto on statute of limitation grounds.

Of the greatest importance, however, is that no statute of limitations issue is part of the trial court decision complained of on appeal to the Court of Appeals, and

no cross-appeal was filed by defendant as to any statute of limitations issue.

The damages allowable under CUTPA would greatly enhance those additionally available to plaintiff in this case.

The appealed judgment is also tangential for other reasons. It rules any tort claims are barred, p.2, but plaintiff had always argued, and the district court had ruled, that none of plaintiff's claims sounded in tort; it was defendant who strove to devine torts issues out of plaintiff's plainly contract issues, so that it could raise statute of limitations issues, but no such matters were raised at trial or on appeal, having all been previously resolved.

The foregoing is illustrative of several irrelevant and prejudicial distortions arrayed against plaintiff and the truth.

REASONS FOR GRANTING WRIT

In view of the foregoing facts it is transparent that the courts below mischaracterized the matters at issue in this case. Plaintiff's expectancy damages claim is entirely unrelated to any unlawful termination claim to which the courts' rulings are tailored.

Moreover, before said courts could have any jurisdiction over any termination issue it is essential that such have been pleaded by defendant as an affirmative defense as constituting an avoidance, Rule 8(c) of the Federal Rules of Civil Procedure, Wright & Miller, Federal Practice and Procedure, Civil 2d., Vol 5, Sec. 1271, p. 446, Fed. R. Civil P. 12(b), C.J.S., Vol. 35A, Federal Civil Procedure, Sec. 301, pp, 438-440, Sec. 306, p.449 (citing numerous federal cases). To allow or consider such

unpled matter deprives plaintiff of his due process rights whereby he must be allowed sufficient time and opportunity to prepare. Costello v. Costello, 186 Conn. 773, 776 (1982), Kron v. Thelen, 178 Conn. 189, 193, 423 A.2d 857, 859, Kukanskis v. Griffith, 180 Conn. 501, 509-510, 430 A.2d 21, 25 (1980), all citing several United States Supreme Court decisions and United States Constitutional Amendment 5th.

As well, even if jurisdictional and constitutional mandates did not preclude the courts' consideration of any termination issue, the amount of plaintiff's claim may not be compromised on the basis of a contractual right to terminate which was not exercised.

Possibly the rulings below refer to a certain internal document of defendant (plaintiff's Exhibit 29) which, for its own

purposes, defendant may have distributed among its various departments and personnel. This document was first produced for plaintiff by defendant during discovery after this case was under way, but it was never represented by anyone to constitute compliance with the aforesaid contract termination provision, ¶11(b). Indeed, the document is not even addressed to plaintiff nor conforms in any way with the requirements of ¶11(b), and it is dated many months after the breaches alleged in the complaint occurred.

In fact, this document was tentatively offered in evidence by plaintiff at the end of trial when the court requested that all such exhibits be offered, because it confirms that plaintiff satisfactorily performed under the contract and was not charged with any misconduct. Moreover, the

contents of said document were not yet officially an exhibit, for no foundation had as yet been laid therefor as required by F.R.E. 901. As well, as ruled in Jefferson Savings & Loan Association v. Lifetime Savings & Loan Association, 396 F.2d 21, 23 (CA9 Cal. 1968), cited in the Apr. 1994 Supplement to Am. Jur. 2d, Vol. 29, Evidence, Sec. 840, p.418:

> A party may introduce documentary evidence prepared by his adversary without being bound by it.

Jefferson cites as authority Jerrold Electronics Corporation v. Wescoast Broadcasting Company, 341 F.2d 653, cert. den. 382 U.S. 817, 86 S. Ct. 42, 15 L. Ed.2d 64 (1965), and Footnote 4, p.23, citing the 2nd Circuit in United States v. Freeman, 302 F.2d 347 (2 Cir., 1962), cert. den. 375 U.S. 958, 84 S. Ct. 448, 11 L.Ed.2d 316 (1963) as follows:

> The movement has been away from the practice of giving artificial values or protection to evidence by preventing the party introducing it from showing that it is false in whole or in part.

It should also be noted that if the jury found defendant breached the contract as alleged in the complaint plaintiff was discharged from any duty to perform under the contract, and the contract survives for the purpose of a lawsuit measuring plaintiff's claims arising out of such breach(s), Bernstein v. Nemeyer, 213 Conn. 665, 672-673, 570 A.2d 154, 168 (1990), Rokalor, Inc. v. Connecticut Eating Enterprises, Inc., 18 Conn. App. 384, 391-392, 558 A.2d 265, 269-270 (1989), citing Vescue v. Lee, 185 Conn. 328, 334, 441 A.2d 556 (1981), Better Building Materials Co. v. Kirschner, 142 Conn. 1, 10, 110 A.2d 464 (1954), 4A Corbin, Contracts, Sec.

946, 17 Am. Jur. 2d, Contracts, Sec. 428, J. Calamare & J. Perillo, Contracts, 3d Ed., 2 Restatement(Second), Contracts, Secs. 237 & 238. See also Barnett v, Barnett, 26 Conn. App. 355, 358, 600 A.2d 1055, 1057 (1992), ruling:

> "Performance of contract is excused when the thing to be done becomes impossible."

Also, where a defendant, as herein, repudiates or nullifies procedures established by a contract, the injured party is excused from performance, Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1259, citing Restatement(Contracts), Sec. 302 (1932 and 3A Corbin, Contracts, sec. 759 (1960), as cited in Frederick v. Conagra, Inc., 713 F. Supp. 41 (1989). Such a breaching defendant may not continue to reap a contract's benefits, Hal Roach Studio v. Film-Classics, 156 F.2d 596, 599.

At minimum plaintiff has a right to a jury determination as to whether defendant committed the breaches alleged, before a court below may rule on any properly alleged affirmative defense alleging termination. If such breach occurred, defendant has plainly forfeited any right it may formerly have had to terminate the contract.

Plainly there is no evidence whatever on the record that any termination ever occurred, other than a general atrophy of the contract due to defendant's failure to perform, and the contract may be deemed to still exist pending such performance. In fact, due to defendant's breach(es), plaintiff may construe the contract to currently be in abeyance, until defendant performs in a manner enabling plaintiff to resume his performance; meanwhile sums accruing thereunder for plaintiff's bene-

fit are unlawfully being withheld from the plaintiff by defendant, unless it be construed that said atrophic state renders the contract terminated, a condition which defendant neither alleges nor apparently can prove. Plaintiff is not required to suffer any losses due to defendant's breaches, and he has pled such breaches and is entitled to a jury verdict as to their existence before any contract termination can be presumed to have taken place by way of mere atrophy caused by defendant's neglect of its duties.

Also, plaintiff is independently entitled to a jury verdict on his pleaded breach of covenant of good faith and fair dealing, even if it could be shown that a termination had occurred. The issue is still open as to whether any such termination was obtained in good faith and

fairness in view of the allegations in the complaint. The courts below have not addressed this properly pled issue, which is another deprivation of plaintiff's due process rights under the 5th Amendment and the procedures of the courts.

As well, in that the Court of Appeals has not ruled upon the issue before it concerning plaintiff's CUTPA claim, an additional deprivation of due process exists. Instead, that court has ruled on a matter pertaining to CUTPA which was not before the court, supra, p.7.

A party not appealing is not entitled to assert any error, in this case pertaining to any statute of limitations matter. The scope of appellate review is limited to the part(s) of the decision below complained of only by the appealing party. Courts of Appeal have jurisdiction only

over appeals from orders and judgments of courts below, EEOC v. Pennsylvania, 768 F.2d 514, 516 (CA3 Pa 1985), citing 28 USCA Sec. 1291.

Moreover, even had a statute of limitations issue been before the Court of Appeals, that court could not properly rule that such statute barred the CUTPA claim, for, in his reply brief, pp.13, 21, plaintiff clarified that the CUTPA claim related to matter recently revealed on discovery in this case, which occasioned plaintiff's amendments and supplements to the complaint, and, because such matter was fraudulently concealed from the plaintiff, the statute of limitations as to such matter was tolled, as provided in Connecticut General Statutes, Sec. 52-595.

Under Connecticut law, a CUTPA plaintiff may recover punitive damages in addit-

ion to attorney fees, S&S Tobacco & Candy Company v. Stop & Shop Companies, Inc. 815 F. Supp. 65, 66 (D. Conn. 1992), citing several 2nd Circuit and Connecticut Supreme Court cases. See also Catucci v. Ouellette, 592 A.2d 962, 964, 25 Conn. App. 56, 61, ruling that CUTPA provides for actual and punitive damages and equitable relief, as well as "any ascertainable loss." Indeed, in Bailey Employment Systems, Inc., v. Hahn, 545 F. Supp. 62, 73, affirmed 723 F.2d 895, it was ruled that double the actual damages as punitive damages would also be awarded.

Consequently it is clear that the courts below improperly deprived plaintiff of the opportunity to obtain a jury verdict which would greatly enhance the total monetary award he could reasonably expect.

Thus no want of jurisdictional amount

can be found in this case, predicated on unpled defenses which were thus waived and may not be considered by the courts below, supra pp.9-10.

Moreover, raising such matters at trial and in rulings by surprise, and without stating any facts or particulars upon which such rulings are based, whereby plaintiff had no reasonable opportunity to prepare adequate responses, is not only improper and prejudicial to plaintiff, but such also deprives him of due process, A party must be given an ample opportunity to secure and present evidence relevant to the existence of jurisdiction. See Colonial Pipeline Company v. Collins, 921 F.2d 1237, 1243 (1991), citing Gould, 853 F.2d at 451, etc., Wright &. Miller, Federal Practice and Procedure, Vol. 5A. Sec. 1271, p.446 and Sec. 1373, pp. 552-554, 555-556. The

courts' lack of specificity in its rulings also prevented plaintiff from framing arguments in opposition thereto. The courts should state the subordinate facts from which conclusions are reached, Faille v. Hollett, 150 Conn. 397, 399, and , as stated in Shaffer v. Coty, 183 F. Supp. 662, 665(S.D. Cal 1960), citing Wetmore v. Rymer, 169 U.S. 115, 121, 18 S. Ct. 295:

"Of course the District Court's 'mode of determination' of jurisdictional issues must always be such as to permit a reviewing Court to ascertain whether the evidence supports the trial court's finding."

Indeed, the foregoing places the courts below in positions where they not only deprived plaintiff of fundamental due process, but as well acted as advo-

cates for defendant, belatedly "pleading" defendant's defenses. Such was done notwithstanding the fact that the district court had issued a Trial Preparation Order (D. 55), which required defendant to reveal all its defenses prior to trial, and none of the foregoing matters was raised in defendant's responses to that order.

Moreover, the jurisdictional amount issue had already been raised and ruled upon in plaintiff's favor, by Judge Dorsey, (CofA App. p.41) in 1990, at a time when all essential facts to conclude such issue were before the court. The issue was thus res judicata on this threshhold question of law. 32 Am. Jur. 2d, Federal Practice, p.760, Wright & Miller, 13A Federal Practice and Procedure, Sec. 2536, p. 537, Stoll v. Gottlieb, 305 U.S. 165,

172, 83 L. Ed. 104, 109.

In the rulings below the courts, as well, disregarded the gravamen of plaintiff's pleadings and testimony, the central substance of which pertained to expectancy damages caused by the deprivation of opportunity to perform the contract, because of defendant's breaches. Instead the courts focus rulings on the amount of pled and unpled minor technical damages, the amount of which is incidental to the entire focus of said pleadings and testimony.

The jury verdict on the expectancy damages on which plaintiff introduced abundant evidence was potentially very high, particularly in view of the evidence of bad faith and unfair dealing of defendant produced, but the courts frustrated such with their own "pleadings." See

Frederick V. Conagra, Inc., 713 F. Supp. 41, 48 (1989), Thompson v. Thompson. 226 U.S. 551, 560, 33 S.Ct. 129, 130, 57 L. Ed. 347, Brotherhood of Locomotive F.E. v. Pinkston, 293 U.S. 79, 55 S.Ct. 1, 79 L. Ed. 219. As ruled in Harger v. Burger King, 729 F. Supp. 1579 (1980):

> The amount in controversy must be determined by the value to be protected. The plaintiffs are suing Burger King in this case to protect their alleged right to continue receiving monthly payments pursuant to a brokerage agreement until February 1994. Therefore the value of the right is the aggregate amount that the plaintiffs are allegedly owed.

Such is, in fact, the type of damages principally sued for by the plaintiff in this case, which should control.

As a result of the foregoing, plaintiff was also deprived of the right to a verdict on additional damages on claims in other paragraphs of the complaint, all

of which were unaddressed, in substance, because the dismissal renders such moot.

All of the foregoing, supported by additional authority, was contained in plaintiffs briefs before the Court of Appeals. Such matters go to the integrity of the federal judiciary and its conformance to the letter and spirit of the Constitution of the United States, federal practice and procedural rules, and the many rulings of the United States Supreme Court, supporting that Constitution and those rules, crucial principles which ought not be allowed to seep away to favor parochial interests.

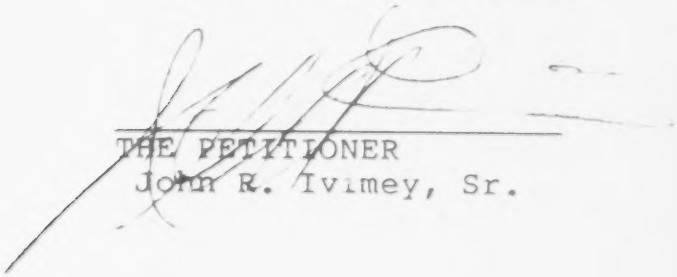
Litigants have a fundamental right to a fair trial pursuant to all the rules of practice and procedure, and their due process rights as guaranteed by the Constition of the United States. Where a

litigant has been deprived of those rights a judgment doing so is reversible and should be reversed.

CONCLUSION

For the foregoing reasons plaintiff respectfully requests this Court to grant the within Petition for Writ of Certiorari.

Respectfully submitted,



THE PETITIONER
John R. Ivimey, Sr.

APPENDIX

(Ruling on Appeal)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PRESENT:

HON. ROGER J. MINOR,
HON DENNIS G. JACOBS,
Circuit Judges
HON. JACOB MISHLER,
District Judge

JOHN R. IVIMEY,
Plaintiff-Appellant,

v. ORDER 93-7852

VARIABLE ANNUITY LIFE INSURANCE CO. &
WILLIAM F. SCOTT,
Defendants-Appellees.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the District of Connecticut, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Plaintiff-appellant John Ivimey

appeals from a judgment entered on June 14, 1993 in the United States District Court for the District of Connecticut (Covello, J.) dismissing his action for lack of subject matter jurisdiction, the district court having found that Ivimey had failed to satisfy the $50,000 amount required for diversity jurisdiction pursuant to 28 U.S. C. Sec. 1332(a)(1) (1988).

Ivimey filed a complaint in this action in July of 1989 against defendant-appellees Variable Annuity Life Insurance Company ("Variable") and its Northeast regional manager, defendant-appellee William Scott. The action arises out of Ivimey's employment with Variable between July of 1983 and March of 1985 as an agent to market tax-exempt annuity contracts to Connecticut public school employees. Sales of the annuities required the approval of the school districts, since the annuities were to be funded by payroll deductions. Moreover, a number of school districts had entered into exclusive contracts with companies other that Variable, which precluded the sale of Variable annuities in

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*Hon. Jacob Mishler of the United States District Court for the Eastern District of New York, siting by designation,

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those districts. In his complaint, Ivimey alleged that Variable had represented that it would be responsible for obtaining school district approval, a pledge that Variable allegedly disavowed only after

Ivimey began working for the company. Ivimey also charged that Variable failed to inform him of the exclusive contracts that restrained him from selling in certain districts.

In Count I of his original complaint, Ivimey alleged that Variable had breach a constructive condition and an implied promise embodied in the agency contract between the parties, as well as an implied covenant of good faith and fair dealing with regard to that contract. Ivimey alleged that this breach by Variable deprived him of income he would have been entitled to before, during and after the term of the contract. In Count II, Ivimey alleged a claim for fraudulent misrepresentation on the part of Variable. In the ad damnum clause, Ivimey requested $850,000 in compensatory damages plus punitive damages. In July of 1991, after discovery, the district court granted Ivimey's motion to amend the complaint to add to Count I a claim for the recovery of unpaid commissions and to add a new Count III in which Ivimey alleged violations of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. Sec. 42-110a, et seq.

After a series of summary judgment motions, the case proceed to trial in June of 1993. At the close of Ivimey's case, the court sua sponte questioned whether the $500,000 jurisdictional amount had been satisfied. After affording Ivimey an opportunity to explain how his damages exceeded $50,000, the court dismissed the action for lack of subject matter jurisdiction. On

Ivimey's motion for reconsideration, the district court issued an order on July 21, 1993 confirming its dismissal. This appeal followed.

Subject matter jurisdiction in diversity cases is conferred upon the district courts where "the matter in controversy exceeds the sum or value of $50,000." 28 U.S.C. Sec. 1332(a)(1). In determining the jurisdictional amount, the sum claimed by the plaintiff usually controls. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). However, "if, from the face of the pleadings, it is apparent to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, . . . the suit will be dismissed." Id. at 289.

In this case, only Ivimey's claims on the contract are viable. Any tort claims are barred by Connecticut's three-year statute of limitations for tort actions. See Conn. Gen. Stat. Sec. 52-577. The claim for unpaid commissions is subsumed within the breach of contract claim. Finally, Ivimey's CUTPA claim is barred by the three-year statute of limitations specified in that act. See Conn. Gen. Stat. Sec. 42-110g(f).

We agree with the district court that under no view of the facts presented at trial could Ivimey have proven contract damages in excess of $50,000. The contract between Ivimey and Variable specified that the contract could be terminated by either arty on thirty days' notice. Accordingly,

Ivimey's damages were limited to those incurred prior to and during the termination period. See 22 Am. Jur. 2d, Damages Sec. 112; King v. Exxon Co., 618 F.2d 1111, 1118 (5th Cir. 1980). In addition, viewing the facts in his favor, Ivimey could have recovered ncidental damages incurred during the same period. However, Ivimey has not shown the type of malicious, bad faith breach of contract which would justify an award of punitive damages. See, e.g., L.F. Pace & Sons, Inc., v. Travelers Indemnity Co., 514 A.2d 766, 775-76 (Conn. App. 1986).

At trial, Ivimey claimed that he anticipated $5000 to $6000 in commissions for the first few years of employment and had incurred a maximum of $11,500 ($37.50 per day times 300 days) in travel expenses during his employment with Variable. Since the employment contract in this case was terminated in March of 1985 after less than two years, Ivimey's total contract damages could not exceed $50,000. From the evidence adduced at trial, this is apparent to a legal certainty.

We have considered all of Ivimey's arguments raised on his appeal and conclude that they are without merit.

HON. ROGER J. MINOR
HON. DENNIS G. JACOBS
HON. JACOB MISHLER

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.